

Appeal from a decision of the Area Manager, Cascade Resource Area, Idaho, Bureau of Land Management, terminating communications site right-of-way grant. IDI-29716.

Set aside and remanded.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Cancellation

Termination of a right-of-way grant for failure of the holder to comply with the terms and conditions thereof requires notice by BLM of the violation and a reasonable opportunity for the holder to cure the noncompliance. When a decision terminating a communications site right-of-way is based on a sheriff's sale of the equipment used on the right-of-way and the holder has taken action to redeem his ownership interest, the decision is properly set aside and remanded pending the outcome of redemption proceedings.

APPEARANCES: David H. Leroy, Esq., Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Arden Casper, President of Tel-Car, Inc. (TCI), and TCI have appealed from a decision of the Area Manager, Cascade Resource Area, Idaho, Bureau of Land Management (BLM), dated August 29, 1997, terminating communications site right-of-way grant IDI-29716.

Right-of-way grant IDI-29716 was issued by BLM to TCI, effective March 5, 1996, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994). The right-of-way grant authorizes TCI, which provides telecommunications and radio paging services, to construct, operate, and maintain a communications site atop Squaw Butte in Gem County, Idaho. The site encompasses

0.23 acres of public land situated in the SW¹/₄ NW¹/₄ sec. 25, T. 8 N., R. 1 W., Boise Meridian, Gem County, Idaho, northeast of Emmett, Idaho. The right-of-way grant provides that it is to be effective until December 31, 2000, unless, prior thereto, it is relinquished, abandoned, terminated, or modified pursuant to its terms and conditions or applicable Federal law or regulation.

In specifically describing the nature of the interest granted, section 2 of the right-of-way grant states that TCI is granted the right to construct, operate, and maintain a "communication site * * * as shown on the attached Exhibit A." (Right-of-Way Grant at 1.) Exhibit A, which is dated February 26, 1996, is a diagram depicting an 8-foot square "Block Building" within a 100-foot square tract described as a "proposed radio equipment structure site." The diagram also locates the building in relation to the site and ties the site to a corner of the public-land surveys by bearing and distance. Further, section 4(d) of the Right-of-Way Grant incorporates "Exhibit B" by reference. (Right-of-Way Grant at 2.) Exhibit B, which is also dated February 26, 1996, is a document entitled "Boise District BLM Radio Site Stipulations." Section 1 of Part 1 of Exhibit B states that: "This right-of-way is for the construction and utilization of the structures and facilities described on the face of the grant under 'Nature of Interest[.]' No other types or kinds of structures or facilities are authorized." (Ex. B at 1.)

At the time of the grant, TCI owned a cinder block building and an attached 70-foot-high tower, along with radio transmitting and receiving equipment, which had been constructed at the site in connection with TCI's previous communications site right-of-way, IDI-013699. ^{1/} According to appellants, TCI had incurred a construction cost of \$25,000 and, during operation of the facility, realized an annual income of \$18,000, providing its services to residential and commercial customers in southwestern Idaho.

It appears from the record that TCI's structures and equipment on the right-of-way were sold at a Gem County sheriff's sale on June 13, 1997, for nonpayment of personal property taxes on that property. The purchaser was Symes Electric, Inc. (SEI). Subsequently, the BLM Area Manager, by letter dated June 25, 1997, requested TCI's concurrence in an assignment of the right-of-way grant to SEI, asserting that "[i]t is appropriate for the new owners [of TCI's building and tower] to be the holders of the right-of-way authorization." He stated that TCI had 15 days to execute the appropriate assignment form, failing which the "right-of-way [grant] * * * will be terminated." Id. There is no evidence that TCI ever consented to the assignment of its grant.

^{1/} Right-of-way IDI-013699 was originally issued to TCI on Jan. 25, 1963, for a term of 50 years, but was cancelled on Jan. 1, 1993, when TCI failed to pay back rentals.

In his August 1997 decision, the Area Manager, having verified that the County regarded the sheriff's sale as valid, terminated TCI's communications site right-of-way grant because of the forced sale of its structures and equipment:

Under the Terms and Conditions of the Right-of-Way, paragraph 4(d) incorporates the Boise District BLM Radio Site Stipulations dated February 26, 1996. Part 1, General Conditions, paragraph 1 of those stipulations, specifically states that "this right-of-way is for the construction and utilization of the structures and facilities described on the face of the grant under [']Nature of Interest['].\" It is clear that Tel-Car, Inc., cannot comply without the personal property it no longer owns or controls. Therefore, Right-of-Way [Grant] IDI-29716 is hereby terminated.

(Decision at 1.) Appellants appealed from the Area Manager's August 1997 decision.

In their notice of appeal (NA), appellants contend that BLM improperly terminated the communications site right-of-way grant without affording TCI the opportunity to contest the sheriff's sale of the personal property used by it in connection with the right-of-way. They state that they are filing a civil action against the County and SEI in State court, challenging the validity of the sale and asserting an equitable right to redeem the property. Appellants contend that, absent final disposition of the State court action, BLM's termination was "premature" and that BLM should have avoided taking such action pending that disposition. (NA at 2.) Along with the copy of the NA subsequently filed with the Board, appellants have provided a copy of their civil complaint (No. CV97-479) filed on October 3, 1997, in the District Court of the Third Judicial District of Gem County, Idaho. (Ex. B attached to NA.) By order dated November 18, 1997, we granted appellants' request to stay the effect of the Area Manager's August 1997 decision pending our review of the merits of the appeal. To date, we have received no information regarding the disposition of appellants' State court action.

[1] Authority for termination of a right-of-way grant by BLM is provided by section 506 of FLPMA, 43 U.S.C. § 1766 (1994), and the implementing regulations at 43 C.F.R. § 2803.4. The authorized officer of BLM may terminate a right-of-way if he "determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant." 43 C.F.R. § 2803.4(b); 43 U.S.C. § 1766 (1994). This is the provision which BLM was applying in its decision terminating the right-of-way when it held that the sale of the communications structures and facilities precluded use of the right-of-way to operate the communications equipment. This same regulation, however, also requires that, where BLM intends to terminate a right-of-way grant for failure to comply with the terms, conditions, or stipulations of the grant or applicable law or regulation, it must first "give the holder written notice that such action is contemplated and the grounds therefor

and shall allow the holder a reasonable opportunity to cure such noncompliance." 43 C.F.R. § 2803.4(d); see 43 U.S.C. § 1766 (1994). A BLM decision terminating a right-of-way without providing the holder with notice and a reasonable opportunity to comply with the terms of the grant is properly set aside and remanded. John Caton, 126 IBLA 335, 338 (1993). The asserted right of appellants to redeem the property sold at the sheriff's sale and the filing of the litigation designed to accomplish that result demonstrate the importance of notice to appellants and a reasonable opportunity to cure the noncompliance. Little benefit is apparent from termination of the right-of-way and issuance of a new right-of-way to SEI if appellants may regain title to the structure, equipment, and facilities operated on the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case is remanded for further proceedings.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge